No. 85-2085

(2)

Supreme Court, U.S.
FILED
JUL 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1986

BEAUDRY MOTOR COMPANY,
an Arizona corporation,

Petitioner,

vs.

ABKO PROPERTIES, INC., CHRYSLER CORPORATION, CHRYSLER MOTOR CORPORATION, and CHRYSLER REALTY CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner could purposefully wait 110 days from the entry of a separate order denying its post-judgment motion to appeal simply because the order was entitled "Civil Minutes" and even though such order met all requirements to begin the time for appeal to run.
2. Whether a court is required to enter two orders from which to appeal even though the first order meets all requirements of an appealable order and is treated as such by all parties.

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6A Moore's Federal Practice, (2nd ed.)
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BEST AVAILABLE COPY

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In its statement of the proceedings below, petitioner has failed to refer to various facts and events which may have a bearing on

the Court's understanding of the case and the issues presented. Respondents therefore will briefly review those pertinent events.

This case began in 1982 when petitioner, relying upon a contract entered into almost a decade earlier, filed its complaint. Almost two years later, after petitioner had repeatedly amended its complaint and in the last few days permitted for discovery, respondents filed their motion for summary judgment. Petitioner responded with a cross-motion for summary judgment, relying on a claim petitioner admitted and the district court found at oral argument never to have been alleged. C.R. 68 at 23-25. On December 7, 1983, the district court entered an order and a separate judgment granting respondents' motion and denying petitioner's motion. C.R. 50 and 51. There is no dispute that this order and judgment were properly prepared, filed, and entered.

Following entry of judgment, petitioner moved for a new trial and to again amend its complaint to assert its newly conceived theory. C.R. 54 and 55.

On January 5, 1984, the district court entered an order entitled "Civil Minutes" denying petitioner's motions ("January 5 Order"). C.R. 62. That order, like the December 7 order and judgment, was a separate document dated, prepared, and signed by the court, entered on the docket (and so dated), and mailed to and received by all parties. C.R. 62. (Retyped copies of the order and relevant docket pages are attached as part of the Appendix for the Court's convenience.) Furthermore, petitioner treated the January 5 Order as exactly such an order in its reply memorandum on the motion for new trial. C.R. 64. In that pleading, petitioner referred to the January 5 Order as the document "in which this Court denied Plaintiff's Motion for New

Trial...." C.R. 64 at 1-2.

As Petitioner has admitted, while a motion for attorneys fees was pending, it purposefully waited 110 days from the entry of the January 5 order to file its notice of appeal. C.R. 73 and Petitioner's Reply/Answering Brief [Regarding Jurisdictional Issues] (before the Ninth Circuit) at 15, n. 3. Again, in that Notice of Appeal, petitioner referred to the January 5 Order as the "Order entered January 5, 1984 denying Plaintiff's Motion for New Trial...." C.R. 73 (emphasis added).

Finally, petitioner repeatedly raised before the Ninth Circuit issues concerning its 110-day delay in filing a notice of appeal. Interestingly, petitioner's primary arguments below dealt not with the form of the January 5 Order, but with the issue of whether the order had to be signed. The Court of Appeals initially dismissed petitioner's appeal from

the December 1983 and January 5 orders and judgment as untimely. It then reinstated that appeal for consideration of whether the January 5 Order had to be signed. The merits panel reheard and rejected all of the arguments of petitioner on his delay in filing his appeal. Beaudry Motor Co. v. ABKO Properties, 780 F.2d 751 at 753-755 (9th Cir. 1986).[1/]

SUMMARY OF ARGUMENT

The petition for a writ of certiorari should be denied for several distinct reasons:

1. The January 5 Order met all of the requirements of an appealable order. Petitioner's only complaint is that the time to appeal can not begin to run unless the order is entitled "Order." On these facts, no

---

[1/] The Court of Appeals expressly found that the January 5 Order had been signed, a fact which petitioner does not now dispute. 780 F.2d at 754 and Petition for Writ of Certiorari at 4.

important issue of law is presented. There is no basis for such a requirement, especially where petitioner knew and treated the January 5 Order as the order denying the post-judgment motion.

2. The decision below does not conflict with prior decisions of the Ninth Circuit, decisions of other circuit courts of appeal or any decision of this Court.

3. Petitioner's position would lead to confusion and an absurd interpretation of the federal rules.

REASONS FOR DENYING THE WRIT

A. There is no requirement for all district courts to use the identical form for post-judgment orders, especially where the order was recognized and treated as a final order.

Petitioner has cited no rule, case, or policy to require all district courts to use the identical form entitled "Order" for post-judgment orders. Such a requirement

simply does not present an important issue of law. Especially here, no such requirement is necessary where all parties recognized and treated the order as being a final order starting the time in which to appeal.

28 U.S.C. § 2107 and Rule 4(a)(4), Fed. R. App. P. require any notice of appeal to be filed within 30 days after the entry of a judgment or an appealable order. This requirement is considered jurisdictional. Browder v. Director, Illinois Department of Corrections, 434 U.S. 257 (1978).

This Court and Rule 4(a)(6), Fed. R. App. P. require that the entry of any judgment or final order meet certain objective requirements to give a party clear notice as to when the time to appeal begins to run. United States v. Indrelunas, 411 U.S. 216 (1973) and 6A Moore's Federal Practice, 2nd ed., ¶¶ 58.02 and 58.02.1 at 58-19 and 58-20. These objective requirements include that any

judgment be filed on a separate piece of pape and be entered in the docket.[4/]

In this case, petitioner does not dispute that the January 5 Order meets all of these requirements to be effective. Thus, it was a separate document (see Appendix), was signed by the Clerk (Petition for Writ at 4), and wa duly entered on the Civil Docket (see Appendix). Moreover, while not required, the order was mailed to all parties (Rule 77(d), F. Rules Civ. P.), such mailing was noted in the district court's docket sheet and the order was received by petitioner.

Petitioner's only complaint is that the January 5 Order was entitled "Civil Minutes" and not "Order". Petitioner points to no requirement provided by statute, case law, or reason for all orders to be of the same form.

[4/] Rule 4(a)(6), Fed. R. App. P. requires an order to be entered in the docket in conformance with Rules 58 and 79(a).

Rather, the rules require objective criteria to be met to place prospective appellants on clear notice. They do not and cannot provide criteria to meet every individual's subjective needs.

Obviously, the procedures of Rules 58 and 79 should be applied mechanically, but not mindlessly. Weinberger v. United States, 559 F.2d 401 at 402 (5th Cir. 1977). Here, all of those requirements have been met and all of the parties treated a document as a final order. Based upon such facts, it should be so treated by the courts. Hamilton v. Nakai, 453 F.2d 152 (9th Cir. 1971), cert. denied, 406 U.S. 945 (1977); Weinberger v. United States, supra; and Kramer v. American Postal Workers Union, AFL-CIO, 556 F.2d 979 (9th Cir. 1977).

Indeed, as the facts of this case show, petitioner's proposed rigid requirement would have served no purpose. Here, the mechanical application of Rules 58 and 79(a) led

petitioner to recognize and treat the January Order as the final decision denying its post-judgment motions. C.R. 64. Even if this recognition was not present, petitioner's delay in filing its notice of appeal was solely due to its own lack of diligence in not determining the effect of the entry of "Civil Minutes." Kramer v. American Postal Workers Union, AFL-CIO, supra and Beaudry Motor Co., supra, 780 F.2d at 755, n.3.

B. Petitioner has not shown a conflict with decisions of this Court or other courts and has not presented an important issue of federal law.

As noted above, petitioner's argument is that regardless of meeting the requirements of Rules 58 and 79, a post-judgment order is not effective: (1) unless it is entitled "Order" and (2) even if all parties treat it as a final order. Petitioner has failed to show any conflict between the decision below and any decision of this Court.

Petitioner's sole argument is that the decision below conflicts with prior Ninth Circuit decisions and a decision in the Seventh Circuit. Petitioner's reliance on those cases is misplaced as the facts in those cases greatly differ from the facts here.

First, in Weldon v. United States, 196 F.2d 874 (9th Cir. 1952), the issue was not whether the form of an order was adequate. As the Court of Appeals noted below, the only issue in Weldon was whether an unsigned and unentered document was authentic, e.g., whether it was prepared at the direction of the district court. 780 F.2d at 754. In contrast, the January 5 Order was on a form prepared by the district court, was signed, was entered, and was treated by petitioner as authentic. C.R. 62, 64 and 73.

Petitioner also argues that the January 5 order was similar to the "notation of proceedings" in Calhoun v. United States, 647

F.2d 6 (9th Cir. 1981). Petitioner's reliance on Calhoun is misplaced. As noted by the Court of Appeals below, 780 F.2d at 755-756, a comparison of the facts in Calhoun and the facts here shows that:

(1) In Calhoun, the "Minutes of the Court" reflected that proceedings were held and the motion was denied. 647 F.2d at 8. In contrast, here a separate order was clearly prepared by the court, dated January 5, and expressly says "IT IS ORDERED that plaintiff's motions are denied." Emphasis added.

(2) In Calhoun, the clerk did not file an order. Rather, he simply marked the docket, on some undefined date, to reflect that proceedings were held and the content of the court's minutes. 647 F.2d at 8. Here, the clerk stamped the separate order as filed and noted the order on the docket sheets on January 5.

(3) In Calhoun, there is no indication that the clerk treated the minutes as an order by mailing copies to counsel in accordance with Rule 77(d). 647 F.2d at 8. In this case, the clerk treated the order as an order, mailed it to counsel, and showed the mailings in the docket. C.R. 62. Plaintiff admits having received the order on January 9, 1984, four days after entry, and referred to it as the decision denying its motion for new trial. C.R. 64.

(4) In its April 20 Notice of Appeal, plaintiff expressly says that it is appealing from the "Order entered January 5, 1984 denying Plaintiff's Motion for New Trial and Motion to Amend Complaint...." Emphasis added.

Finally, there is no conflict between the decision below and Rappaport v. United States, 557 F.2d 605 (7th Cir. 1977). In Rappaport,

the district court entered a minute order granting summary judgment. It failed, however, to prepare a separate judgment and have it entered. Thus, the Seventh Circuit found that Indrelunas, supra and Rule 58 had not been met because the order was never transformed into a final judgment. The "minute order", however, was still an effective order.

In contrast, here the district court entered an order and a separate judgment on December 7. C.R. 50 and 51. Approximately one month later, the January 5 order was entered dismissing petitioner's post-judgment order. Neither Rappaport, supra nor any other case or authority requires a second, separate document entitled "Order" to be filed. In contrast, see United States v. Clearfield State Bank, 497 F.2d 356 (10th Cir. 1974) (two documents not required where filed document was intended to be an order).

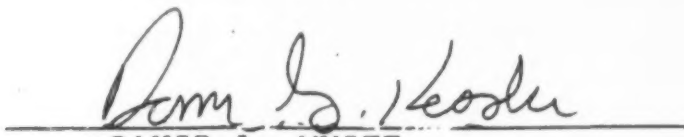
C. Petitioner's argument would lead to confusion and an absurd interpretation of the federal rules.

Finally, petitioner argues that regardless of meeting the requirements of Rules 58 and 79(a) and regardless of petitioner's treating the January 5 Order as final, the time to appeal never even began to run until a second document entitled "Order" is entered. Not only does this argument render absurd the entire proceedings in this case, but it would lead to confusion in the district courts. Each untimely filing of an appeal would lead the tardy appellant to argue that some form of the order was inadequate whether that form be its title or its exact language. Such an excuse for lack of diligence should not be permitted where the mechanics of Rules 58 and 79 have been followed to give clear notice to potential appellants of the need to file a notice of appeal.

CONCLUSION

For the reasons set forth by the Ninth Circuit below and in this pleading, the petition for a writ of certiorari should be denied.

RESPECTFULLY SUBMITTED,



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July 16, 1986

28 U.S.C. § 2107

Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree....

RULE 58, FED. R. CIV. P.

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of judgment shall not be delayed for the taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

RULE 4(a), FED. R. APP. P.

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

....

(6) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

(CIVIL MINUTES - GENERAL)

Civil Case No. CIV-82-262-TUC-ACM
Date January 5, 1984

Title: BEAUDRY MOTOR CO. vs.
ABKO PROPERTIES, INC.

==========

Present HON. ALFREDO C. MARQUEZ JUDGE

Deputy Clerk Court Reporter

ATTYS FOR PLAINTIFF(s) ATTYS FOR DEFENDANT(s)

==========

Proceedings: __Open Court __Chambers X Other

For reasons set forth in defendant's response to plaintiff's motions for new trial and to amend complaint,

IT IS ORDERED that plaintiff's motions are denied.

FILED
January 5 12:44 PM
W.J. Furstenau
U.S. District....
By Deputy Clerk

Copies issued to:
MANDIG, WHITE, ACM

CIVIL DOCKET CONTINUATION SHEET

Plaintiff BEAUDRY MOTOR COMPANY
Defendant ABKO PROPERTIES, INC et al
Docket No. 82-262 Page [4-5]

Date	NR.	Proceedings
1983		
09/13	38	Stip & ORD that Pltf shall have til 09/23/83 to file memo & stmt of fact in oppos to Dft's Mot for Sum Jdmt; Dfts have tl 10/12/83 to file reply memo & any stmt of facts in spprt of Mot for Sum Jdmt; Pltf shall file any Cross Mot by 9/23/83; Hrg set for 11/21/83 @ 9 am (see order) (ACM) (cc: Mandig, White, ACM)
09/27	39	Pltf's Cross-Mot for Sum Jdmt w/Memo P/A
09/27	40	Pltf's Statement of Facts Purs to Local Rule 11(i).
09/27	41	Pltf's Resp in Opposition to Dft's Mot for Sum Jdmt.
09/27	42	Pltf's Aff in Supp of Resp in Opp to Mot for Sum Jdmt.
10/12	43	Dfts Reply to Resp to Mot for Sum Jdmt
10/26	44	Dfts Resp to Cross-mot for Sum jdmt
10/26	45	Dfts Stmt under LR11 in Oppos to Pltfs Cross-Mot for Sum Jdmt

11/14	46	Pltf Reply in Spprt of Cross-Mot for Sum Jdmt
11/15	47	Dft Ntc of Fil Aff of William J. Craib
11/15	48	Dft Aff of William J. Craib, employee of Chrysler Realty Corp
11/21	49	M/E (ACM): Hrg on Dfts Mot for Sum jdmt & Pltfs Cross-Mot. ORD THAT Dfts Mot for sum jdmt is GRANTED. Pltfs Cross-Mot is DENIED. Formal ord to follow. (cc: ACM)
12/07	50	ORD that dft Mot for Sum Jdmt is GRANTED and Pltf Cross Most [sic] for Sum Jdmt is DENIED (ACM) (cc: White, Mandig, ACM)
12/07	51	Jdmt in favor of dfts and against pltf; FUR ORD pltf take nothing by their cmplt and this action is dism. (cc: White, Mandig, ACM)
12/19	52	Dft Ntc of Tax of Costs
12/19	53	Dft Applic for Award of Atty's Fees
12/19	54	Pltf Mot for new trial &/or rehrg & Ntc of Hrg set for 01/23/84 @ 10 am
12/23	55	Pltf's Mot to Amd Complt. (complete mot filed 12/27/83)
12/27	56	Pltf Not of hrg set for 01/23/83 @ 10 am RE: doc #55
12/27	57	Stip re: doc #53

12/28	58	ORD that Pltf shall have through 01/03/84 to file a resp to Dfts Applic for Award of Atty's Fees & Dft shall have through 01/16/84 w/i to file reply memo in support (ACM) (cc: Mandig, White, ACM)
12/29	59	Memo of Clerk's Taxation of Costs in the amt of $2,144.80 (DCC) (cc: Kyle/Mandig, Kessler/White, ACM)
1984		
01/03	60	Dft Resp to Mots for New Trial &/or Rehrg & to Amd Cmplt
01/03	61	Pltf Resp in Oppos to Dft Applic of Atty's Fees
01/05	62	M/E (ACM): For reasons set forth in Dft resp to Pltf Mots for New Trial and to Amd Cmplt, ORD that Pltf Mots are DENIED. (cc: Mandig, White, ACM)
01/05	63	Pltf Aff of Mailing of #61
01/09	64	Pltf Reply in Spprt of Mot for New Trial &/or for Rehrg & in Spprt of Mot to Amd Cmplt
01/16	65	Dfts' Reply Memo in Support of Appl for Atty Fees
01/23	66	ME (ACM) re Mt for Attny Fees; matter taken under advisement
03/09	67	Reporters Transcript of hrg held 01/23/84 bef Judge Marquez
03/19	68	Reporters Transcript of hrg held 11/21/83 bef Judge Marquez

03/21	69	ORD that jdmt entered in favor of dfts and against pltf in the sum of $8,000 as and for attorneys fees; dfts have not furnished the crt with any info on the costs and dfts reply seems to have abandoned this claim; The claim for reimbursement of cost is DENIED. (ACM) (cc; Mandig, White, ACM)
04/02	70	Dft Mot to Amd &/or Clarify Ord of 03/21/84
04/04	71	M/E (ACM): Dft Mot to Increase the Award of Atty's Fees is DENIED. It was not the Crt's intention to set aside the Clerk's Taxation of Costs (cc: White, Kessler, Mandig, ACM)
04/20	72	Dft Ntc of Appeal from Ord dtd 03/21/84 & Ord dtd 04/04/84 (cc: White, Mandig, CA, ACM)
04/20	--	Rec #38851 for appeal filing fees $70.00 from Dfts
04/20	73	Pla Ntc of Appeal form [sic] Ord entrd 12/07/83 & Ord entrd 01/05/84 and Ord entrd on 03/21/84 (cc: Mandig, White, CA, ACM) [Cross-Appeal]
04/20	--	Rec #38853 for appeal filing fees $70.00 from Pla [Cross-Appeal]

....